Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Review of the Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

THE PROMOTING ACTIVE COMPETITION EVERYWHERE ("PACE") COALITION OPPOSITION TO BELLSOUTH'S PETITION FOR CLARIFICATION AND/OR PARTIAL RECONSIDERATION

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SUMMARY

The Commission should deny BellSouth's petition, in which it essentially attempts to rewrite the *Triennial Review Order* and to eviscerate several critical requirements of the Act. In the *Triennial Review Order*, the Commission again reiterated that section 271 imposes a separate and distinct obligation on Bell operating companies ("BOCs") to make available certain network elements. The plain language of section 271 is unambiguous: BOCs are required to make certain networks available (loops, transport, local switching and signaling) regardless of whether the particular element is unbundled pursuant to section 251 of the Act. BellSouth has not presented any evidence to the contrary – nor can it – and its petition must be denied.

In addition, under section 271 of the Act, BellSouth is required to make available broadband facilities to requesting carriers. Section 271 does not contain any exceptions to the absolute requirement that a BOC that has obtained section 271 authority must provide loops, transport, local switching and signaling to requesting carriers; in particular, it does not distinguish, for example, between loops used to provide broadband services and those used to provide narrowband services. BOCs, including BellSouth, are required to provide access to the network elements regardless of the service for which they will be used. The Commission also must reject BellSouth's attempts to evade its obligations under the Act and the Commission's rules and orders to provide combinations of network elements to requesting carriers and to permit commingling of network elements.

The Commission also should deny BellSouth's petition to treat distinct loop types, such as fiber-to-the-curb (FTTC), in the same manner as fiber-to-the-home (FTTH) for unbundling purposes under section 251. BellSouth seeks to avoid its obligation to unbundle FTTC to requesting carriers. The Commission already has recognized that FTTC is separate and

distinct from FTTH. Furthermore, contrary to BellSouth's claim, there is no evidence on the record that CLECs would not be impaired without access to FTTC. The Commission should maintain its bright-line distinction between FTTC and FTTH, and should reject BellSouth's attempts to redefine FTTH and to avoid its obligations under the *Triennial Review Order* and the Commission's rules.

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The Promoting Active Competition Everywhere ("PACE") Coalition, through its attorneys, hereby opposes BellSouth's Petition for Clarification and/or Partial Reconsideration of the Federal Communications Commission's ("Commission") *Triennial Review Order*.[1] The PACE Coalition is composed of competitive local exchange carriers ("CLECs") that provide a variety of telecommunications services to business and residential consumers throughout the country.[2] Each of the PACE Coalition carriers offers a form of bundled local exchange and long

[1] *See* BellSouth Petition for Clarification and/or Partial Reconsideration (Oct. 2, 2003) ("Petition"). *See also Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) (*Triennial Review Order*). In this opposition, the PACE Coalition focuses on the section 271 and Fiber-to-the-Curb/Fiber-to-the-Home issues that BellSouth raised in its petition.

[2] PACE Coalition members include: ACCESS Integrated Networks, Inc.; ATX Communications, Inc.; Birch Telecom; BizOnline.com, Inc. d/b/a Veranet Solutions; BridgeCom International; DataNet Systems; DSCI Corp.; Ernest Communications; IDS Telcom LLC; InfoHighway Communications Corp.; ITC^DeltaCom Communications, Inc.; Granite Telecommunications; MCG Capital Corporation; MetTel; Microtech-Tel; Momentum Business Solutions Inc.; nii communications; Sage Telecom, Inc.; and Z-Tel Communications, Inc.

distance services, among other services. In providing their services to residential and small business customers, PACE Coalition carriers use the combination of unbundled network elements ("UNEs") commonly referred to as UNE-P.

The Commission should deny BellSouth's petition, in which it essentially attempts to rewrite the *Triennial Review Order* and to eviscerate several critical requirements of the Act. There is no question that section 271 of the Act – as the Commission repeatedly has recognized – imposes a separate and distinct obligation on Bell Operating Companies ("BOCs") to make available certain network elements.[3] In addition, contrary to BellSouth's argument, carriers are permitted to combine network elements obtained under section 271 with unbundled network elements ("UNEs") and other services, and are not restricted in commingling such network elements with wholesale services.

The Commission also should reject BellSouth's request to reconsider the treatment of Fiber-to-the-Curb ("FTTC"), and instead maintain its bright-line distinction between FTTC and Fiber-to-the-Home ("FTTH").

I. SECTION 271 ESTABLISHES A SEPARATE OBLIGATION TO MAKE CERTAIN NETWORK ELEMENTS AVAILABLE

The Commission must deny BellSouth's request to clarify that the obligations of section 271 of the Act are co-extensive with the unbundling obligations set forth in section 251 of the Act.[4] In the *Triennial Review Order*, the Commission correctly reaffirmed that a BOC's obligation to provide network elements under section 271 of the Act is independent of its

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3 *Triennial Review Order* ¶¶ 652-55 (stating "we continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.").

4 *See* BellSouth Petition at 12-15.

obligation under section 251(c)(3) of the Act.[5] Indeed, the Commission emphasized that "the plain language and structure of section 271(c)(2)(B) establishes that BOCs have an independent and ongoing access obligation under section 271."[6]

All BOCs are required to make available to requesting carriers the network elements identified in section 271 regardless of whether the particular network element is included on the minimum list of UNEs. Pursuant to section 251(c)(3) of the Act, ILECs, such as BellSouth, are required "to provide, to any requesting telecommunications carrier...nondiscriminatory access to network elements on an unbundled basis...."[7] Under section 271 of the Act, BOCs – a subset of LECs – are required to make available the following network elements that the Commission previously had required to be unbundled to requesting carriers: (1) local loop transmission; (2) transport; (3) local switching; and (4) signaling.[8]

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5 *See Triennial Review Order* ¶¶ 654-57.

6 *Id.* ¶ 654.

7 47 U.S.C. § 251(c)(3).

8 *See Triennial Review Order* ¶ 650 (stating that four of the "checklist items relate to network elements in earlier orders the Commission has deemed to be UNEs under the standards of section 251(c)(3)); *see also* 47 U.S.C. § 271(c)(2)(B)(iv)-(vi), (x), stating in pertinent part,

> ...(B) Competitive Checklist. – Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following: ...
>
> (iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.
>
> (v) Local transport from the trunk side of the wireline local exchange carrier switch unbundled from switching or other services.
>
> (vi) Local switching unbundled from transport, local loop transmission, or other services...

Specifically, under section 271 of the Act, all BOCs, including BellSouth, must provide these network elements in order to be eligible to obtain authority to offer in-region interLATA services. Once the Commission grants such authority, a BOC is obligated to continue to provide these network elements as a condition of its on-going authority to provide interLATA service. The obligation to provide these network elements is wholly separate from whether the element is unbundled pursuant to section 251 of the Act.[9]

Congress specifically carved out the entities to whom the requirements would apply and the particulars of the requirements. The Commission correctly explained that, by its own terms, section 251 applies to all ILECs, whereas section 271 applies only to BOCs, a category of ILECs.[10] Congress designed section 271 to address the BOCs' long-held monopoly over local telecommunications services and to condition BOC entry into long distance markets on the opening of the local exchange market to competition.[11] If Congress had intended for sections 251 and 271 to be co-extensive, it would not have differentiated between ILECs and BOCs. Furthermore, in carving out section 271, Congress identified specific network elements that it wanted to make available to requesting carriers, regardless of whether the element is on

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(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

9 The Commission already has granted in-region interLATA authority to BellSouth and, therefore, BellSouth must fulfill its obligation to provide these four network elements to requesting carriers. *See, e.g., Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana,* 17 FCC Rcd 9018 (2002).

10 *See Triennial Review Order* ¶ 655.

11 As the Commission recognized in the *Triennial Review Order*, section 271 was a direct result of the Modification of Final Judgment (MFJ) which established the terms for the settlement of the Department of Justice's antitrust suit against AT&T. *See Triennial Review Order* at note 1986 (citing *United States v. Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983)).

the Commission's national list of network elements that must be unbundled. There is simply no basis to find that sections 251 and 271 are co-extensive, as BellSouth suggests.

BellSouth invokes the D.C. Circuit's decision in *USTA*[12] as a basis for the relief it seeks, arguing that the conclusions of the *Triennial Review Order* "cannot be reconciled with ... the D.C. Circuit's direction in USTA."[13] This claim is baseless. In *USTA*, the Court rejected the FCC's uniform national application of the statutory impairment standard, finding that the Supreme Court's *Iowa Utilities Board* decision requires a more granular approach to impairment that takes into account local market conditions.[14] The D.C. Circuit did not address the unbundling obligations imposed on BOCs by section 271, or consider whether those obligations extend beyond or are co-extensive with the unbundling obligations contained in section 251. The *USTA* decision therefore affords no basis for departing from the plain language of section 271.

In addition, the Commission does not have the authority to grant the relief BellSouth requests. Section 271 of the Act unambiguously requires BOCs to make certain network elements available to requesting carriers. Since the statute – and Congress's intent – is clear, the Commission must give effect to the language of the statute.[15] It is hornbook law that although the Commission has the authority to implement a statute, this authority does not permit

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12 *United States Telecommunications Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*").

13 BellSouth Petition at 12.

14 *USTA*, 290 F.3d at 426.

15 *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (stating that "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

it to rewrite the statute.[16] The only manner in which the Commission even could attempt to grant BellSouth's requested relief would be to exercise its forbearance authority under section 10 of the Act, which is beyond the scope of BellSouth's current petition. The PACE Coalition will not address the merits of any future BellSouth request that the Commission exercise its forbearance authority here except to point out that it is premature to even entertain requests for forbearance from enforcement of section 271 until that section has been fully implemented, which clearly is not the case today.

II. UNDER SECTION 271 OF THE ACT, BELLSOUTH IS REQUIRED TO MAKE AVAILABLE BROADBAND FACILITIES TO REQUESTING CARRIERS

The Commission should deny BellSouth's request to clarify that section 271 does not require broadband facilities to be made available to competitors. As stated above, section 271 establishes a separate and independent obligation on BOCs to make available specific network elements: loops, transport, local switching, and signaling. Under the plain language of the statute, BellSouth, as a BOC that has obtained section 271 authority, is required to provide each of these network elements. Section 271 does not contain any exceptions to this absolute requirement; it makes no distinction between loops used to provide broadband services and those used to provide narrowband services. BOCs are required to provide access to the network elements listed therein regardless of the service for which they will be used.[17] Accordingly, the

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16 *See, e.g., Indiana Michigan Power Company v. Department of Energy*, 88 F.3d 1272, 1276 (D.C. Cir. 1996) (rejecting agency ruling as a "rewrite" rather than an "interpretation").

17 The Commission has consistently interpreted section 271's requirement to provide unbundled "[l]ocal loop transmission" to mandate unbundling of loops used to provide both narrowband and broadband services. *See, e.g., Application by Bell Atlantic New York for Authorization Under Section 271 of the Telecommunications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 4095-4127, ¶¶ 268-342 (1999).

Commission must reject BellSouth's claim that network elements used to provide broadband services or capabilities should be excluded from the requirements of section 271 of the Act.

III. THE COMMISSION SHOULD REJECT BELLSOUTH'S ATTEMPT TO LIMIT THE ABILITY TO COMBINE OR COMMINGLE NETWORK ELEMENTS MADE AVAILABLE UNDER SECTION 271

The Commission must reject BellSouth's attempts to evade its obligations under the Act and the Commission's rules and orders to provide combinations of network elements to requesting carriers and to permit commingling of network elements.[18] Specifically, the Commission should deny BellSouth's request to clarify that BOCs are not required to (1) combine network elements made available under section 271 with UNEs made available under section 251, or (2) commingle section 271 elements with wholesale services. To hold otherwise would grant BellSouth free reign to impose anti-competitive "glue charges" on new entrants.

In support of its position, BellSouth relies on the *Erratum* released after the *Triennial Review Order*, which removed portions of paragraph 584 and footnote 1990 from the *Order*. The *Erratum* merely resolved an inconsistency in the text of the *Order*. Paragraph 584 originally stated that LECs must permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to section 271..." In contrast, footnote 1990 originally "decline[d] to apply [the] commingling rule ... to services that must be offered pursuant to these [section 271] checklist items." With both references eliminated, there is no need for clarification of this point and there is no basis in the record to grant BellSouth the right to impose wasteful reconnection charges on competitors.

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[18] BellSouth Petition at 15 (stating that "the Commission should clarify that transmission, switching, transport, or signaling unbundled only under Section 271 need not be commingled with wholesale services or combined with UNEs.").

IV. THE COMMISSION SHOULD DENY BELLSOUTH'S PETITION TO RECONSIDER THE TREATMENT OF FIBER-T0-THE-CURB

The Commission should deny BellSouth's petition to treat distinct loop types, such as fiber-to-the curb (FTTC), in the same manner as fiber-to-the home (FTTH) for unbundling purposes under section 251. In its petition, BellSouth notes that the FCC severely limited mandatory unbundling of both greenfield and overbuild FTTH facilities, and BellSouth argues that the Commission should treat "service equivalents to fiber-to-the-home, such as fiber-to-the-curb" in the same manner.[19] In other words, BellSouth wants to avoid its obligation to unbundle FTTC to requesting carriers. BellSouth's petition rests on a flawed assumption: that FTTC and FTTH are indistinguishable. In fact, as the Commission already has recognized in treating FTTC differently from FTTH, the opposite is true: FTTH and FTTC are at different stages of deployment and the services provided over these loops are distinct. Additionally, contrary to BellSouth's claim, there is no evidence on the record that CLECs would not be impaired without access to FTTC. The Commission should maintain its bright-line distinction between FTTC and FTTH, and should reject BellSouth's attempt to redefine FTTH.

A. BellSouth Has Not Produced Any Record Evidence To Support Moving the Impairment Line from FTTH to FTTC

There is no record basis in this proceeding to justify BellSouth's proposed relief. After reviewing a massive record, the Commission conducted a full-blown impairment analysis in which it concluded that mandatory unbundling of FTTH – but not FTTC – should be severely curtailed. In order to support its petition, BellSouth must adduce sufficient evidence to permit the Commission to conclude that (i) the impairment analysis in the TRO is incorrect; and (ii) the impairment standard entails equivalent treatment of FTTC and FTTH for purposes of section

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[19] BellSouth Petition at 1.

251(c)(3). BellSouth has not even attempted to meet this burden of proof, and its petition must therefore be rejected summarily because it does not provide the evidentiary basis necessary for the Commission to modify the rule it adopted recently in the TRO.

BellSouth asks the Commission to adopt a rule that any fiber deployment approaching within 500 feet of an end-user customer's premises should be deemed to qualify as FTTH for unbundling purposes. Even assuming that BellSouth is correct that FTTC may in some instances be equivalent to FTTH (and the PACE Coalition most certainly does not concede this), BellSouth has not offered any evidence that 500 feet is the appropriate line of demarcation for impairment purposes. In particular, there is no evidence to support the conclusion that impairment exists when fiber deployment exceeds 500 feet from the end-user's premises while impairment does not exist when fiber deployment is less than 500 feet from the premises. This is an arbitrary number cynically selected by BellSouth solely to ensure that all of its own FTTC deployments that qualify for minimum mandatory unbundling under the new FTTH rule.

B. The Commission Should Maintain its Bright-Line Distinction Between FTTC and FTTH

The Commission adopted a bright-line test in determining what qualifies as FTTH for purposes of the section 251 unbundling rules: specifically, the Commission defined an FTTH loop as a local loop "consisting entirely of fiber optic cable (and the attached electronics), whether lit or dark fiber, that connects a customer's premises with a wire center (*i.e.,* from the demarcation point at the customer's premises to the central office)."[20] In adopting this definition, the Commission expressly excluded other "'fiber-in-the-loop network architectures . . ., such as 'fiber to the curb' (FTTC), 'fiber to the node' (FTTN), and 'fiber to the building.'"[21] Although

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20 *Triennial Review Order* at n.802

21 *Id.* at note 811.

the PACE Coalition disagrees with the FCC's decision to severely limit the ILECs' mandatory unbundling obligations for FTTH, the PACE Coalition urges the Commission to maintain this bright-line for purposes of business certainty and regulatory stability, to say nothing of administrative convenience.

In addition, BellSouth is wrong when it asserts that FTTC is the same as FTTH. First and foremost, 500 feet of copper is not the functional equivalent of 500 feet of fiber. While all parties would concede that copper has a higher capacity threshold at shorter distances compared to longer distances, its total capacity is finite, whereas the capacity of fiber is limited only by the optronics on either end. Fiber offers significantly greater existing and future bandwidth, and fiber is a much more robust platform for the provision of a number of existing and to-be-developed high-bandwidth services. The FTTC configuration has not served as the type of advanced services platform envisioned by section 706 of the Act. It speaks volumes that BellSouth uses its FTTC configuration today largely to provide garden-variety voice (TDM) and low speed data services. Like Joe Isuzu, BellSouth is telling a lie when it says that FTTC is the same as FTTH for unbundling purposes.

C. The Rationale for Excluding FTTH from Unbundling Obligations is Inapplicable to FTTC

Neither the Commission's policy nor impairment goals can be satisfied with regard to FTTC, such that FTTC is not required to be unbundled. The Commission concluded that declining to require ILECs to unbundled FTTH would further its policy goal of stimulating facilities-based deployment.[22] The Commission also concluded that requesting carriers are not impaired without access to FTTH, particularly given that the deployment of such loops was in its

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22 *See id.* ¶ 272.

infancy.[23] The Commission does not have to exclude FTTC from unbundling obligations in order to satisfy this same deployment goal; indeed, ILECs already have deployed FTTC in measurable quantities, and will continue to do so. Furthermore, contrary to BellSouth's claim, there is no evidence in the record – and BellSouth has not provided any supporting data – that CLECs would not be impaired without access to FTTC.

It is unnecessary to exclude FTTC from unbundling obligations in order to satisfy the Commission's policy goal of facilitating deployment. As stated above, in excluding FTTH from unbundling obligations, the Commission noted that FTTH is in its infancy and concluded that "relieving incumbent LECs from unbundling requirements for [FTTH] networks will promote investment in, and deployment of, next-generation networks."[24] There is no need to exclude FTTC from unbundling obligations to spur deployment of FTTC. ILECs, including BellSouth, already have deployed a substantial amount of FTTC absent the incentive of not having to unbundle it. Indeed, FTTC is precisely the type of network upgrade (for example, remote terminal configurations such as Project Pronto and digital loop carrier systems) that ILECs already have deployed without having any incentive from the FCC to do so. Furthermore, unbundling FTTC would not further the Commission's goal of deploying broadband. As stated above, BellSouth currently has deployed over one million access lines served by FTTC, but it uses those lines predominantly for voice – not broadband – services.

Removing FTTC from unbundling obligations could retard its deployment. ILECs already have a built-in advantage in the deployment of FTTC: the ILEC already has a copper link between the pedestal and the subscriber's premises. CLECs, however, do not maintain that link. As such, a CLEC that wants to build an FTTC link already has a more

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23 *Id.* ¶ 274.

24 *Id.* ¶ 272.

difficult time attempting to complete that last link from the pedestal to the subscriber premises. If the CLEC is unable to use the existing ILEC last-mile facility to take the copper from the pedestal to the customer premises, it will encounter an even greater disadvantage than the ILEC, and, as such, competitive deployment will be stymied.

V. CONCLUSION

For the foregoing reasons, the PACE Coalition respectfully requests that the Commission deny BellSouth's petition for clarification and/or partial reconsideration.

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November 6, 2003

CERTIFICATE OF SERVICE

I, Alice R. Burruss, a legal secretary at Kelley Drye & Warren LLP, do hereby certify that on this 6th day of November 2003, unless otherwise noted, a copy of PACE Coalition's Opposition to BellSouth's Petition for Clarification and/or Reconsideration was sent by U.S. mail postage prepaid to each of the following:

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